September 27, 2017

Submitted Electronically to Docket No: **EPA-HQ-OW-2017-0203**

Comments of the National Rural Electric Cooperative Association (NRECA)

RE: U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Definition of "Waters of the United States" – Recodification of Pre-existing Rules 82 Fed. Reg. 34899 (July 27, 2017)

The National Rural Electric Cooperative Association (NRECA) submits these comments in support of the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Corps) proposed rule: Definition of "Waters of the United States"—Recodification of Pre-existing Rules (82 Fed. Reg. 34899, July 27, 2017). NRECA is a member of the Utility Water Act Group (UWAG) and the Waters Advocacy Coalition (WAC), and these comments hereby incorporate by reference the comments submitted by UWAG and WAC. NRECA supports the current proposal by EPA and the Corps (collectively, "the Agencies") to rescind the 2015 rule (80 Fed. Reg. 37,054, June 29, 2015) and to codify the status quo that is now being implemented under the U.S. Court of Appeals for the Sixth Circuit stay of the 2015 rule.

The definition of "Waters of the United States" (WOTUS) is important to the utility sector, and especially rural electric cooperatives which own and maintain 2.6 million miles or 42 percent of the nation's electric distribution lines serving 56 percent of the nation and 88 percent of all counties.

NRECA is the national service organization for America's Electric Cooperatives. The nation's member-owned, not-for-profit electric co-ops constitute a unique sector of the electric utility industry – and face a unique set of challenges. NRECA represents the interests of the nation's more than 900 rural electric utilities responsible for keeping the lights on for more than 42 million people across 47 states. Cooperatives serve an average of 7.4 consumers per mile of line and collect an annual revenue of approximately $16,000 per mile of line, as compared to the industry average of 34 customers and annual revenue of between $75,500 per mile of line for investor-owned and (48 consumers) $113,000 per mile of line for publicly owned utilities or municipals.

NRECA's member cooperatives include 63 generation and transmission (G&T) cooperatives and 834 distribution cooperatives. The G&Ts are owned by the distribution cooperatives they serve. The G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives, those cooperatives that provide power directly to the end-of-the-line consumer-owners. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

Electric cooperatives are private, independent electric utilities, owned by the members they serve. Most are small businesses (as defined by the Small Business Administration) and don't have investors or access to large cash surpluses to help defray the costs of regulations. The costs are borne directly by the farmers, ranchers, small businesses and other residents of the nation's rural communities – including those in 93 percent of the nation's persistent poverty counties – who write a check each month to their co-op to pay for their electric service.

NRECA supports the arguments presented by UWAG and WAC that the Agencies should rescind the 2015 WOTUS rule:

(1) The 2015 WOTUS rule is inconsistent with three Supreme Court decisions recognizing important limits on Clean Water Act (CWA) geographic scope. The 2015 rule ignored key limits established by the Supreme Court in Riverside Bayview (establishing jurisdiction over wetlands that actually abutted a navigable water), SWANCC (rejecting federal jurisdiction over open ponds not adjacent to open waters, regardless of their use by migratory birds), and Rapanos (rejecting federal jurisdiction based on any hydrological connection to a navigable water).

(2) The 2015 WOTUS rule fails to preserve the states' authority to regulate non-navigable water resources. The 2015 rule raised serious federalism concerns by asserted jurisdiction over features with little or no relationship to navigable waters (e.g., channels that infrequently host ephemeral flows, non-navigable ditches, and isolated waters). The 2015 Rule would allow the federal government to take control of land use and planning by extending jurisdiction to essentially all wet and potentially wet areas. Under the rule, many types of waters and features that were previously regulated as "waters of the state" or that states purposely chose not to regulate (e.g., roadside ditches, channels with ephemeral flow, arroyos, industrial ponds) would be subject to federal regulation as "waters of the United States."

(3) The 2015 WOTUS rule lacks clarity on key terms and definition. If implemented, this lack of clarity would create significant confusion and would fail to put parties on notice as to whether their conduct violates the CWA. Under the 2015 rule, definitions of key terms and concepts, such as "impoundments," "floodplain," "ordinary high water mark," and "significant nexus," are vague, inconsistent with case law, and/or would likely lead to more regulatory uncertainty. This ambiguity creates a rule that fails to give the public fair notice of when and where discharges are unlawful and gives standard-less discretion to agency staff to determine which waters are jurisdictional and which are not.

NRECA wishes to emphasize two particularly troubling features of the 2015 WOTUS rule that especially affect electric cooperatives.

(1) The 2015 rule would expand WOTUS jurisdiction to man-made industrial features on cooperative facility sites. The 2015 rule would consider many industrial features located inside the fence line of an electrical generating plant that are actually designed and operated to manage wastewater and are themselves regulated under the CWA as point sources. If such a feature were deemed jurisdictional, such as through "adjacency" to jurisdictional water, the plant would be placed in the untenable position of being required to treat wastewater before it enters the wastewater treatment systems designed to treat it. Not only is such an outcome patently ridiculous, but all costs would be borne by our member owners – for no positive or improved environmental outcome.

(2) The 2015 rule would expand WOTUS jurisdiction over remote features with little connection to Traditional Navigable Waters (TNWs). The 2015 Rule would extend WOTUS jurisdiction to various remote water features such as ditches, groundwater, and erosional features (i.e., gullies, rills, and swales) which could serve as a hydrological connection that would demonstrate that a feature has a "significant nexus" and therefore become jurisdictional. These and similar features are common across the type of rural terrain often crossed by cooperative transmission and distribution lines. Cooperatives that endeavor to apply the rule's definitions for themselves, could face civil penalties of up to $51,570 per day for

unauthorized discharges to Waters of the United States should their assessment prove incorrect, and, again, those costs would be borne directly by our member owners.

NRECA also agrees with UWAG and WAC that the record established during the 2015 rulemaking does not restrict the Agencies' authority to rescind that rule. Case law cited in our coalition comments clearly confirms that the Agencies have the authority both under the CWA and previous Court decisions to undertake a rulemaking to repeal their own regulation. That both the Sixth Circuit and the North Dakota District Court stayed the 2015 WOTUS rule, finding that parties challenging the rule (56 industry and municipal parties and 31 states) were likely to succeed on the merits of their cases further supports the significant problems with the rule and the need for it to be rescinded.

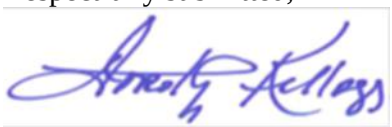
NRECA supports the UWAG and WAC positions that the Agencies should recodify the prior WOTUS regulations. First, the 2015 WOTUS rule has been stayed for nearly two years, and no enforcement actions were taken between the effective date and the stays. The prior rule is, in fact, the operative rule regarding federal jurisdiction at this time and should be so reflected in the Code of Federal Regulation. Second, should the Supreme Court determine that the Sixth Circuit does not have authority to review challenges to the 2015 WOTUS rule, the nationwide stay would be lifted creating significant regulatory uncertainty as the 2015 rule remains stayed in some states (those under the North Dakota District Court) and will surely be challenged in other district courts throughout the country. Finally, recodifying the prior regulations makes sense and provides regulatory continuity for electric cooperatives and the rest of the regulated community. Such action will avoid potential confusion regarding which regulations apply should the nationwide stay be lifted and provide a familiar framework for CWA jurisdictional determinations until the Agencies promulgate a new WOTUS rule.

Finally, NRECA most emphatically urges the Agencies to promulgate a new definition of "Waters of the United States." Recodifying the prior regulations will provide clarity and regulatory certainty in the near term, but there are many issues with the pre-existing regulations and guidance documents that should be addressed through a new rulemaking. We support the Agency's intent to undertake a "Step 2" rulemaking to clearly articulate federal-state lines of CWA authority and provide clarity and certainty on the scope of WOTUS. In addition to recognizing the important role of the states under the CWA, a legally defensible WOTUS Rule should embrace the full history of the Supreme Court's review of the scope of "Waters of the United States."

All Americans value and deserve a healthy environment. However, the economic challenges NRECA and our member-owners face underscore the importance of cost-effective regulation. We believe that the 2015 WOTUS rule was not cost-effective, and we support the current proposal by the Agencies to rescind the 2015 rule and to recodify the prior regulations until such time as the Agencies can undertake a subsequent rulemaking to propose a new definition of WOTUS.

If you have any questions regarding these comments, please contact me at Dorothy.kellogg@nreca.coop.

Respectfully submitted,



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